No.

In the Supreme Court of the United States

October Term, 1971

ROBERT WILLIAM BIXLER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS

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Petitioner prays that writ of certiorari issue to review the judgment of the Supreme Court of Illinois entered in this cause on September 30, 1971.

Opinion Below

The opinion of the Supreme Court of Illinois is reported at 49 Ill.2d 328, 275 N.E.2d 392, and is reprinted here as Appendix A.

Jurisdiction

The judgment of the Supreme Court of Illinois (Appendix B) was entered on September 30, 1971. A timely petition for rehearing was denied on November 24, 1971. (Appendix C). The jurisdiction of this Court is invoked pursuant to Title 28, U.S.C., §1257(3).

Questions Presented

1. Whether the petitioner was denied due process of law contrary to the Fourteenth Amendment to the Constitution of the United States because of prejudicial pretrial publicity and prejudicial publicity during the trial and further, and because the trial court did not take proper precautions to prevent prejudicial publicity from harming the defendant.

2. Whether the trial court should have stricken the testimony of three witnesses who identified the petitioner under such circumstances as to be unnecessarily suggestive and conducive to irreparable mistaken identification, so that the petitioner was denied due process of law under the Fourteenth Amendment of the Constitution of the United States.

Statement

The petitioner, sometimes hereinafter referred to as the defendant Robert William Bixler, was indicted by the grand jury of LaSalle County, Illinois for the crime of robbery and theft. He was tried by a jury which rendered a verdict of guilty on each count upon which the court entered the judgment from which an appeal was taken to the Supreme Court of Illinois. The trial court sentenced the defendant to imprisonment to the Illinois State Penitentiary for not less than three years nor more than ten years on the charge of robbery. The Supreme Court of Illinois affirmed the judgment of the trial court.

Facts relating to prejudicial pretrial publicity

Prior to trial, the defendant moved for an order changing the place of trial to another county. In support of his motion, he introduced in evidence certain items which appeared in the newspaper known variously as the "Daily Republican Times" and later as the "Daily Times." These newspaper articles are contained in pages 1 through 14 of the defendant's group exhibit containing various newspaper articles.[1]

In order to establish the setting for the motion to change the place of trial, the following facts must be related: (R. 3-26) It was agreed that the defendant, Robert William Bixler, had been arrested on October 21, 1966, for the crime of robbery of a federally insured savings and loan association. The article on page 1 of the defendant's exhibits relates certain purported facts of that case. The article stated that the defendant was charged with a robbery of the Ottawa Federal Savings and Loan Association on July 28, 1966. The article also stated that the defendant was questioned about a robbery on September 30, 1966, at the Northern Illinois Corporation. The Northern Illinois Corporation robbery is the subject matter of the instant case. The article then went on to state that a witness had seen Mr. Bixler on October 20th in a Kroger's Supermarket, had followed him and then notified the Ottawa Police Department who took him into custody that evening. In addition to the details of the Ottawa

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[1] The newspaper articles were introduced at various times in the pretrial hearings and during the trial of the case. They were not marked and numbered as such. However, the court did admit them all in evidence in connection with the various motions which were made because of the pre-trial publicity and the pages are numbered from 1 through 19 in the volume containing the defense exhibits.

Federal Savings and Loan Association robbery, the article gave the details of the Northern Illinois Corporation robbery.

On October 22, 1966, there appeared in the Daily Republican Times, a story of an interview with the teller of the Ottawa Savings and Loan Association who had claimed to have recognized Bixler and who had set in motion the events which culminated in his arrest. On page 3 of the exhibits was an article contained in the Daily Republican Times of October 25, 1966, which reported a continuance before the United States Commissioner in Chicago, Illinois, and a further account of the savings and loan robbery.

On page 4 of the exhibits is an account in the Daily Republican Times of November 1, 1966, of a continuance before the United States Commissioner.

On page 5 of the defendant's exhibits is a front page article in the Daily Republican Times of November 5, 1966, which reported the return of the indictment against Mr. Bixler in the United States District Court for the Northern District of Illinois.

On page 6 of the defendant's exhibits is an article which appeared on November 10, 1966, which recounted the defendant Bixler's plea of not guilty in the Federal Court.

On page 7 of the defendant's exhibits is an article which appeared on December 9, 1966, in the Daily Republican Times which reported the setting of the date of January 23, 1967, as the date of trial and it further recounted the details of the identification made by the bank teller.

Pages 8 through 12 of the defendant's exhibits contain articles which appeared in the issues of the Daily Republican Times of January 24 through January 27, 1967.

These articles contain the details of the trial testimony and reported the verdict of not guilty which was returned in the United States District Court. The same article which reported the verdict of not guilty also reported the comment of the State's Attorney of LaSalle County that he was "amazed" by the verdict and his further statement that he intended to discuss the question of prosecuting Bixler on a charge which was not identified in the newspaper article. However, the article did, at a later point, discuss the Northern Illinois Corporation robbery.

Pages 13 and 14 contained a story which appeared on March 2, 1967, in the Ottawa Daily Times (formerly the Daily Republican Times) which concerned the fact that the defendant surrendered on the instant indictment and also contained a statement that the defendant had been acquitted of the charges in the Federal Court.

In analyzing the question of the change of place of trial, we ask the Court to take judicial notice of the following facts: LaSalle County, according to the 1960 census report, had a population of 110,800. There are four major population centers in the county: Ottawa, the county seat, had a population of 19,408, in 1960; LaSalle had a population of 11,897, in 1960; Peru had a population of 11,443, according to a special census in 1966; and Streator had a population of 16,868, in 1960.

The Daily Times of Ottawa had a circulation of 14,290, according to the Audit Bureau of Circulation on September 30, 1967. The newspaper, Tribune, of LaSalle, Peru and Oglesby had a circulation of 17,757, according to the Audit Bureau of Circulation on September 30, 1967, and the Times Press of Streator had a circulation of 12,102, according to the Audit Bureau of Circulation on

September 30, 1967. (This information is contained on pages 85, 83 and 87, respectively, of the "Editor and Publisher International Year Book, 1968," Editor and Publisher Company, New York City, New York, 1968. Similar information is filed of record with the Postmaster General under the provisions of Title 39, United States Code, Section 4369.)

Facts relating to prejudicial article published during trial concerning suppressed evidence

Prior to trial, the defendant presented a motion to suppress as evidence, a red plaid plastic bag and a blue denim jacket. This motion was granted. (R. 70-74) The State elected not to appeal and therefore the Court's ruling stands as the law of the case.

That afternoon the jury was selected and sworn to try the issues in the case.

In the edition of the Daily Times of Ottawa, published Wednesday, June 14, 1967, the day on which the motion to suppress was granted and the jury selected, there appeared the following article on the front page:

RULES FOR BIXLER ON SEARCH 'PROOF'
(Headline)

The trial of Robert Bixler charged with a September 30th robbery of the Northern Illinois Loan Corporation got off to a surprise start today in Circuit Court as Judge Leonard Hoffman allowed a motion by the defense to suppress evidence police said they obtained in a search.

Jason Bellows, Chicago attorney, representing Bixler, charged that evidence from a search of Bixler's belongings in the home of Eugene Feely, the defendant's brother-in-law, was obtained illegally.

A search warrant had been issued to search the Webster Street residence of Bixler, but the defendant had moved.

Police and FBI agents learned that his belongings had been moved to the Feely residence and obtained permission to search the Feely home but there was no warrant to search it, it was brought out.

Judge Hoffman ruled that the Constitutional provision for protection from search and seizure does not allow a third party to waive the rights of the defendant.

He also ruled that the belongings of Bixler were removed from his residence without Bixler's permission.

This afternoon, the selection of a jury began.

The following morning, counsel for the defendant moved for the trial court to voir dire the jury individually to determine whether they read the article. (R. 135-136). The court denied the motion, saying, "There is nothing offensive about that article which could effect substantially the basic rights of this defendant."

Facts relating improper identification procedures

Three witnesses identified the defendant as the person who committed the alleged robbery of the Northern Illinois Corporation. These witnesses were H. L. Hetrick, (R. 159 et seq.); Shirley Carman, (R. 238 et seq.); and Lorraine Burns, (R. 313 et seq.).

The defendant moved to strike the identification testimony of those witnesses on the basis of *Stovall* v. *Denno*, 388 U.S. 293 (1967); and *Palmer* v. *Peyton*, 4 Cir., 359 F.2d 199. (R. 416-418)

The witness Hetrick testified that he was called to the police station at about 7:30 on October 20, 1966. (R. 198-200) He was told that the police wanted him to look at someone. That "someone" was the defendant, Bixler. Bixler was standing in an adjoining room where he could be seen through a two-way glass. (R. 201) There was no line-up for Hetrick to view. (R. 201) It is also evident from the record (R. 202 et seq.) that not only the instant Illinois corporation robbery was discussed but also that of the Ottawa Federal Savings and Loan Association.

Mrs. Carman was also called to the police station in the early evening hours of October 20, 1966, and she too was shown the defendant through the two-way glass. (R. 265-266) During that time, she asked the police to put different types of sunglasses on the defendant. (R. 267-268) After so doing, the witness, Mrs. Carman, told the police that she "thought it was him." (R. 272)

Mrs. Burns was also called to the police station on October 20, 1966, and was asked to come down to the police station and make an identification. (R. 315) At approximately 7:00 o'clock, in the evening, she was shown a photograph of the defendant but was never shown the defendant in the flesh. (R. 317) Also, Mrs. Burns was shown only the one photograph. (R. 325-326)

Method of raising questions here presented for review.

The questions here presented for review were each raised in the trial court as above stated. Petitioner thereafter preserved them for review by motion for new trial. The questions were each ruled upon by the Supreme Court of Illinois.

REASONS FOR GRANTING WRIT

1. (a) The conflict between the decision below and certain decisions of the United States Court of Appeals for the Seventh Circuit construing Marshall v. United States, 360 U.S. 310; Irvin v. Dowd, 366 U.S. 717; and Sheppard v. Maxwell, 384 U.S. 333.

The prime reason for seeking certiorari in this case is to test the ruling of the Supreme Court of Illinois that the trial judge did not act improperly when he refused to question the jurors as to whether they had read a newspaper item containing a report of the granting of a motion to suppress evidence. Although the article did not state the nature of the evidence suppressed (a red bag similar to that carried by the robber and certain items of clothing similar to that worn by the robber) there was left to the speculation of the reader the nature of the evidence suppressed. The jury had been selected in the afternoon of the day on which the trial judge had granted the motion to suppress. The newspaper article appeared in the evening newspaper. The next morning Counsel for the petitioner requested that the judge interrogate the jurors as to whether they had read the article. The trial judge refused to do so. The Supreme Court of Illinois affirmed this action stating that the article was not prejudicial. The determination by the Supreme Court of Illinois that the newspaper article was not prejudicial was made without any reference to any standards against which a measurement could be made. The court below failed to take into consideration such standards for prejudicial effect as Section 3.5(f) of the American Bar Association's *Standards Relating to Fair Trial and Free Press* which

requires the excuse of any juror aware of the content or reports of a potentially prejudicial nature "if reference to the material in question at the trial itself would have required a mistrial to be declared." The United States Court of Appeals for the Seventh Circuit in *United States* v. *Solomon* (7th Cir. 1970) 422 F.2d 1110, 1118 n.7, commented favorably on that test but refused to adopt it "to the exclusion of all other relevant indices of partiality."

Solomon was but the latest of a line of cases decided by the Seventh Circuit establishing procedures for inquiry of the jury as to possibly prejudicial newspaper reports published during trial. *United States* v. *Accardo* (7 Cir. 1962) 298 F.2d 133; *Margoles* v. *United States* (7 Cir. 1969), 407 F.2d 727; and *United States* v. *Hutul* (7 Cir. 1969) 416 F.2d 607 along with Solomon establish that upon motion of the defendant the trial judge has a duty to make at least a collective interrogation of the jury to determine whether there was contact with possibly prejudicial newspaper reports. These cases further provide that once contact has been established, the trial judge must conduct a further inquiry to determine the effect of the publicity.

The decision by the Supreme Court of Illinois is thus in conflict with those of the Court of Appeals for the Seventh Circuit and we are presented with a situation wherein there is a strong possibility that a federal writ of habeas corpus might be granted to the petitioner here. In order to resolve this conflict certiorari ought to be granted.

(b) The conflict between the decision below and the decisions of this Court in Marshall v. United States, 360 U.S. 310; Irvin v. Dowd, 366 U.S. 717; and Sheppard v. Maxwell, 384 U.S. 333.

The second major reason for seeking certiorari in the case is to test the ruling of the Supreme Court of Illinois that the trial judge did not act improperly in refusing to grant a change of venue from the county because of massive pretrial publicity. The case was tried in Ottawa, Illinois. Ottawa a town of 19,408 population is the county seat of La Salle County which had a population of 110,800. The figures are from the 1960 census. There are three other major population centers in the county: LaSalle, a city of 11,897; Peru, a city of 11,443, according to the 1966 special census; and Streator, a city of 16,868.

The jury list for the jury of June 5, 1967, contained the names of 16 persons who were residents of Ottawa and 4 persons who were residents of South Ottawa. 17 persons on that list were residents of Streator. 11 persons were residents of LaSalle. 7 persons were esidents of Peru. 7 persons were residents of Oglesby. 6 persons were residents of LaSalle. 7 persons were residents of Mendota and 10 persons were residents of scattered sections of the county. Aside from the publicity which this case received in the Ottawa newspaper which is part of the record in this case, the voir dire examination of the jury disclosed that there was publicity in the Streator newspaper also. (R. 95)

Prior to the trial of this cause, the petitioner had been tried for and acquitted of, in the United States District Court for the Northern District of Illinois, Eastern Division, sitting in Chicago, the crime of larceny from a fed-

erally insured savings and loan association. From October 21, 1966, when he was arrested, to January 27, 1967, the day following his acquittal, numerous articles appeared in the Ottawa newspaper. Most of these articles were factual in nature except for the article of January 27, 1967, which while reporting the acquittal also reported that the State's Attorney of LaSalle County was amazed at the result. That article also contained an account of the robbery in the instant case for which the petitioner had been arrested and identified at the same time as his arrest and identification in the savings and loan case.

The problem presented in this case does not concern itself with the fact that the press had reported the facts of this particular case. The evil lay in the fact that most of the pretrial reporting concerning the defendant, Bixler, was about the case in the Federal Court in Chicago, in which he had been charged with a crime of larceny from a federally insured savings and loan association. This was an entirely separate and unrelated offense. The prejudice arising from this publicity was compounded by the statement of the state's attorney who prosecuted the present case, that he was amazed by the acquittal in the Federal Court.

"We have here the exposure of jurors to information of a character which * * * could not be directly offered as evidence. The prejudice to the defendant is almost certain to be as great when that evidence reaches the jury through news accounts as when it is a part of the prosecution's evidence. * * * It may indeed be greater for it is then not tempered by protective procedures." *Marshall* v. *United States*, 360 U.S. 310, 312-313. " 'Freedom of discussion

should be given the widest range comparable with the essential requirements of the fair and orderly administration of justice.' * * * But it must not be allowed to divert the trial from the 'very purpose of a court system * * * to adjudicate controversies, both criminal and civil, in the calmness and solemnity of the court room according to legal procedures.' * * * Among these 'legal procedures' is the requirement that the jury's verdict be based on evidence received in open court, not from outside sources." *Sheppard* v. *Maxwell*, 384 U.S. 333, 350-351.

Admittedly, the trial judge conducted the voir dire of the jurors to determine whether they could be impartial, despite the accounts which they had read in the newspapers. Naturally, all of the jurors stated that they could be fair and impartial. Nevertheless, as this Court said in a slightly different context in *Bruton* v. *United States*, 391 U.S. 123, 129.

" 'The fact of the matter is that too often such admonition against misuse is intrinsically ineffective in that the effect of such a non-admissible declaration cannot be wiped from the brains of the jurors. The admonition, therefore, becomes a futile collocation of words and fails of its purpose as a legal protection to the defendants against whom such a declaration should not tell.' * * * 'The government should not have the windfall of having the jury be influenced by evidence against a defendant which, as a matter of law, they should not consider but which they cannot put out of their minds.' "

2. The conflict between the decision of the Supreme Court of Illinois and the opinions of this Court in Stovall v. Denno, 388 U.S. 293, and Simmons v. United States, 390 U.S. 377.

Three witnesses identified the defendant as the person who committed the alleged robbery of the Northern Illinois Corporation. These witnesses were H. L. Hetrick, (R. 159 et seq.); Shirley Carman, (R. 238 et seq.); and Lorraine Burns, (R. 313 et seq.).

The defendant moved to strike the identification testimony of those witnesses on the basis of *Stovall* v. *Denno*, 388 U.S. 293 (1967); and *Palmer* v. *Peyton*, 4 Cir., 359 F.2d 199. (R. 416-418).

In *Stovall*, this Court recognized the rule that a defendant is entitled to relief where the confrontation resulting in the identification of the defendant was conducted in a manner which was so "unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." 388 U.S. 293, 301-302. In so doing, the court cited with approval the case of *Palmer* v. *Peyton*, 4 Cir., 359 F.2d 199:

> As a matter of law, a defendant who objects to an identification on the basis that it was the result of procedures which were so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law, is entitled to a determination by the judge of its admissibility.

Since *Jackson* v. *Denno*, 378 U.S. 368, at least, the rule has become imbedded in our jurisprudence that when evidence is obtained by means which deprive a defendant of due process of law, the defendant is entitled at some stage in the proceedings to object to the use of that evidence

and to have a fair hearing and reliable determination on the issue presented. Also, since *Jackson*, a defendant is entitled to have the trial judge alone make the initial determination without the irrelevant and impermissible considerations which might affect the jury's determination.

In *Simmons* v. *United States*, 390 U.S. 377, 383-384, the court spoke of the dangers of photographic identification. "It must be recognized that improper employment of photographs by police may sometimes cause witnesses to err in identifying criminals. A witness may have obtained only a brief glimpse of a criminal, or may have seen him under poor conditions. Even if the police subsequently follow the most correct photographic identification procedures and show him the pictures of a number of individuals without indicating whom they suspect, there is some danger that the witness may make an incorrect identification. This danger will be increased if the police display to the witness only the picture of a single individual who generally resembles the person he saw, or if they show him the pictures of several persons among which the photograph of a single such individual recurs or is in some way emphasized. The chance of such identification is also heightened if the police indicate to the witness that they have other evidence that one of the persons pictured committed the crime. Regardless of how the initial misidentification comes about, the witness thereafter, is apt to retain in his memory the image of the photograph, rather than of the person actually seen, reducing the trustworthiness of subsequent line-ups or court room identification."

The test established by *Simmons* is that the conviction will be set aside if the photographic identification procedure was so unpermissibly suggestive as to give rise to a very substantial likelihood of misidentification.

"This," said the court, "accords with a resolution of a similar issue in *Stovall* v. *Denno*, 388 U.S. 293, 301-302, and with the decisions of other courts on the question of identification of photograph." 390 U.S. 377, 384.

Applying this standard, the identification of the defendant by Mrs. Burns through the use of a photograph must fall when viewed in the light of the circumstances surrounding the identification. Mrs. Burns testified that she saw a man coming out of the Northern Illinois Corporation office on September 30, 1966, at approximately 1:10 to 1:15 in the afternoon. (R. 298) She described the man as having dark hair and a dark complexion, wearing dark blue denim jacket, light colored pants and sunglasses. The man was carrying a red plaid bag in his hand. At that time, Mrs. Burns was "25 to 50 feet" away from the individual. (R. 300) The man left the loan company, according to Mrs. Burns, walked towards the alley-way in her direction, stopped, and made a motion as if he were stuffing things down into the bag and then ran down the alley. (R. 301-302) Mrs. Burns claimed to have seen the man for approximately two or three minutes. (R. 306)

Under these circumstances, for the police to have called Mrs. Burns to the station some three weeks after the robbery and to have shown her only the single photograph of the defendant is an identification procedure so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. There were no circumstances which required the use of the single photograph technique as were present in *Stovall* where the police feared that the witness was dying or in *Simmons* where the FBI was required to begin an immediate investigation of a bank robbery. The police here had the defendant in custody. They could have conducted a line-up. There

was no need for haste and the circumstances all militate against this type of identification.

The identifications made by the other two witnesses are as equally suspect as that of Mrs. Burns. In both instances, the witnesses were brought into the room where the defendant could be viewed alone. In the case of the witness, Hetrick, there was conversation concerning the robbery of the Ottawa Federal Savings and Loan Association. The witness, Carman, required the police to put certain special types of sunglasses on the defendant. The facts clearly require the application of the rule of *Stovall* v. *Denno*, 388 U.S. 293, that a defendant is entitled to relief where the confrontation resulting in the identification of the defendant was conducted in a manner which was so "unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law." 388 U.S. 293, 301-302.

The defendant was in custody, there was no need for the kind of immediate confrontation as was required in the *Stovall* case. The one man line-up conducted by the Ottawa Police Department was made under such circumstances as to have denied the defendant due process of law.

CONCLUSION

For the reasons advanced herein, the Petition for Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the Supreme Court of Illinois

DAVIS, Justice.

The defendant was indicted by the LaSalle County grand jury on February 20, 1967, for the offenses of robbery and theft committed on September 30, 1966. A trial by jury, which began on June 14, 1967, resulted in his conviction on both charges, and he was sentenced to the penitentiary for a term of not less than 3 nor more than 10 years on the robbery charge.

On September 30, 1966, Shirley Carman, an employee of the Northern Illinois Corporation in Ottawa (a loan company), was alone in the office about 1:00 P.M., when a man walked in and ordered her to "put all the money on the counter." He carried a red plaid bag with a long drawstring plastic band around the top, and was dressed in a blue denim jacket and tan pants. Currency in the amount of $554 was taken. Mrs. Carman identified the defendant as the man who took the money.

H. L. Hetrick, circulation manager of a newspaper in Ottawa, was in the Elks Club directly across the street from Northern Illinois Corporation prior to the time of the robbery and observed a man outside the loan company office. Hetrick described the man, whom he first noticed standing in the alley, as dressed in a blue denim jacket, tan pants, black shoes, and stated that he had sunglasses which he put on and took off, and that he carried a red plaid bag. When Hetrick left the Elks Club to return to his office, he passed within a foot of the man. Hetrick continued to watch the man through the window of his office,

and saw him walk up and down the street in front of the loan company, then put on a pair of black gloves and rapidly enter the loan company. When the man later ran out of the loan company's office he was pursued by Hetrick, but without success. Hetrick identified the defendant as the man he had observed for approximately 40 minutes.

Lorraine Burns testified that she saw the man come out of the office as she was returning to work after lunch, and her description of him coincided with that of the other two eyewitnesses. She also identified the man she saw as the defendant.

The defendant was taken to the Ottawa police station by officers of the city police department on the evening of October 20, and there was identified as the person who committed the robbery of the Ottawa Federal Savings and Loan Association. He was also then identified by the witnesses Hetrick and Carman as the person who robbed the Northern Illinois Corporation. He was permitted to go home and was told to, and did, return to the police station the following morning, October 21, 1966, at which time the F.B.I. took him into custody for the robbery of the Ottawa Federal Savings and Loan Association located in Ottawa, a Federal offense. At this time he was questioned about the robbery of the Northern Illinois Corporation, but was not charged with that offense. He remained in Federal custody in Chicago until he was found not guilty in the Federal court on January 25, 1967, and he was then released. He was indicted on the charge in question on February 20, 1967, and was then taken into custody for this offense.

The defendant contends here that pretrial newspaper publicity entitled him to a change of place of trial; that the manner of his identification denied him due process

of law; that proof of his possession of money after the robbery should not have been admitted in evidence; and that he was entitled to discharge in that he was not brought to trial within 120 days after he was taken into custody.

[1] As to the issue of pretrial publicity, the defendant was the subject of several newspaper articles in the local papers, the first of which appeared on or about October 22, 1966—subsequent to his arrest. This article carried an interview with the teller of the savings and loan association who had identified him. Subsequent brief newspaper articles mentioned his appearance before the United States Commissioner in Chicago, his indictment in the United States District Court, his plea of not guilty there, and his eventual acquittal. The last of the pretrial news accounts appeared on March 2, 1967, more than three months prior to his trial on the charges in question. It recounted his arrest on the indictment for the robbery of Northern Illinois Corporation and that he had been found not guilty of the Federal charge.

When the trial began on June 14, 1967, the defendant's motion to suppress evidence (certain items of clothing taken from the home of his brother-in-law) was granted, and the newspaper reported a true and exact account of the trial court's order. Accurate and factual reports of the trial were published as it was in progress. A fairly lengthy examination of prospective jurors in regard to pretrial publicity was conducted by the court and by counsel. The jurors who indicated familiarity with the articles were examined individually, outside of the presence of the other jurors, as to their memory of the accounts and as to any possible influence caused thereby. After publication of an article concerning the suppression of evidence, counsel for the defendant requested permission to examine the jurors as to any influence the article might have had on them. The

court admitted the newspaper article in evidence, found nothing about it which could substantially prejudice the rights of the defendant and denied defense counsel's request. We too have read the article and agree with the finding and ruling of the trial court.

The defendant's contention that he was prejudiced by pretrial publicity is not well taken. He relies on Sheppard v. Maxwell, 384 U.S. 333, 348-356, 86 S.Ct. 1507, 16 L.Ed.2d 600, 612-617, wherein Sheppard was subjected to extensive adverse newspaper, radio and television publicity; newsmen were seated inside the bar during the trial; witnesses and counsel were interviewed repeatedly at length and their statements were represented as evidence by the press; lengthy comments were made on the testimony; accusations against the defendant which were not made at the trial were printed; the jurors were permitted to make phone calls and they received calls and letters pertaining to the case during their deliberations; and numerous other disruptive irregularities occurred, both before and during the trial. The facts in *Sheppard* were very different from those in the case at bar, and *Sheppard* is clearly distinguishable from it.

In People v. Hryciuk, 5 Ill.2d 176, 125 N.E.2d 61 (a rape case), and People v. Murawski, 394 Ill. 236, 68 N.E.2d 272 (an abortion case), the newspaper articles dwelt upon the sordid facts of the respective offenses which by their very nature provoked intense indignation and created a situation readily susceptible to bias and prejudice against the respective defendants. In *Hryciuk*, the news story, which was read by the jurors the evening before they rendered their verdict, stated that Hryciuk had confessed to two murders and boasted that he had attacked more than fifty women, and that he had been arrested while trying to attack a young woman. In *Murawski*, the newspaper article

recited a prior indictment for murder by abortion against the accused and a second indictment for an attempted abortion where the victim had died. In addition, the State's Attorney argued that the accused was "trafficking in this illicit business of killing babies before they are born," (394 Ill. at 242, 68 N.E.2d at 274) and the only facts to support this statement were found in the newspaper articles. These two cases, with reference to their attendant newspaper publicity, are in no respect similar to the case at bar.

Where the publicity precedes the trial by several months and where the jurors selected indicate that they have no preconceived notions about the defendant's guilt or innocence, and have not been influenced by anything they may have read or heard, there is no requirement that the place of trial be changed. People v. Speck, 41 Ill.2d 177, 185, 186, N.E.2d 208.

[2] The defendant next contends that the confrontation resulting in his identification was so unnecessarily suggestive and conducive to irreparable mistaken identification that he was denied due process of law, and cites Stovall v. Denno, 388 U.S. 293, 302, 87 S.Ct. 1967, 18 L.Ed. 1199, 1206, in support of his contention. Two of the identification witnesses viewed the defendant at the police station through a glass. There was no lineup. The third witness identified a photograph of him. These identification procedures took place October 20, 1966, and the rule, requiring the exclusion of identification evidence which is tainted by exhibiting the accused to identifying witnesses before trial in absence of counsel, affects only those cases involving such confrontations after June 12, 1967. Stovall v. Denno, 388 U.S. 293, 296-302, 87 S.Ct. 1967, 18 L.Ed.2d 1199, 1203-1206.

The improper use of photographs may lead to error in identification, but their use in the investigation of criminal activity is a necessary and accepted practice. A conviction will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a substantial likelihood of misidentification. (Simmons v. United States, 390 U.S. 377, 384-386, 88 S.Ct. 967, 19 L.Ed.2d 1247, 1253-1254.) The test of *Simmons* is clearly met in the instant case. Also it is apparent from the opportunity of observation on the part of the identification witnesses, and particular Hetrick, that their in-court identification of the defendant had an origin completely independent of the pretrial identification at the police station. People v. Harris, 46 Ill.2d 395, 398, 263 N.E.2d 35.

[3] The trial court admitted evidence that the defendant had been unemployed for three months prior to the robbery, was behind in his rent, and had borrowed money, but that immediately after the robbery, he made a loan payment of $152, paid the rent, and purchased merchandise for $39.95. The defendant contends that the court erred in admitting such evidence. We recognize the rule of evidence that where a defendant is on trial for a crime in which pecuniary gain is the usual motive, evidence of the sudden acquisition of money by the defendant is admissible, even though the source of the money is not traced. United States v. Jackskion, (2d Cir.) 102 F.2d 683, 684, People v. Link, 365 Ill. 266, 286, 287, 6 N.E.2d 201; Wigmore on Evidence, 3d ed., vol. 1, sec. 154, p. 601.

[4] The defendant's final contention is that he was in the custody of the La Salle County authorities on the instant charge on the date of his initial detention by the F.B.I. on October 21, 1966. On October 20, 1966, he was questioned in regard to the robbery of Northern Illinois Corporation and was identified by certain witnesses. How-

ever, no charges were placed against him for this offense until an indictment was returned against him on February 20, 1967. He relies on People v. Fosdick, 36 Ill.2d 524, 224 N.E.2d 242, but there the defendant was served with an arrest warrant issued upon a complaint for rape which was filed in Champaign County while he was under Federal arrest in that county. The charge was subsequently dismissed to allow DeWitt County to take the defendant for prosecution on another charge, and new, but identical, charges were filed against the defendant in Champaign County, where custody had previously been acquired but voluntarily relinquished. In *Fosdick* we held that the voluntary dismissal of the charges against the defendant on the motion of the State and without notice to the defendant could not be used to evade the provisions of the 120-day rule. The rationale of *Fosdick* should not be applied in the case at bar, since La Salle County did not voluntarily relinquish its custody of the defendant to the Federal authorities. In People v. Jones, 33 Ill.2d 357, 300 at page 361, 211 N.E.2d 261 at page 263, we stated: "It is well settled that it is incumbent upon the defendant to show, in an application for discharge, that he was committed, gave no bail, and was not tried within 4 months thereafter, and that delay of trial did not happen on his application. Further, the record must affirmatively establish these facts. (Citations)". Here the record reflects that the defendant was indicted and taken in custody for this offense on February 20, 1967 and that his trial began June 14, 1967. Thus, he was tried within the 120 day requirement.

Since the record discloses no error, the judgment of the circuit court of La Salle County is affirmed.

Judgment affirmed.

RYAN, J., took no part in the consideration or decision of this case.

APPENDIX B

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

AT A TERM OF THE SUPREME COURT, *begun and held in Springfield, on Monday, the 13th day of September in the year of our Lord, one thousand nine hundred and seventy-one, within and for the State of Illinois.*

* * *

Be It Remembered, *that, to-wit: on the 30th day of September, 1971, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

PEOPLE STATE OF ILLINOIS,

Appellee,

No. 41041 vs.

ROBERT WILLIAM BIXLER,

Appellant.

Appeal from Circuit Court La Salle County

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and

inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment *aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.*

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of La Salle County, *aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error.*

APPENDIX C

BE IT REMEMBERED, that, to-wit: on the 24th day of November, A.D. 1971, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said Court, had and entered of record, to-wit:

PEOPLE STATE OF ILLINOIS,

Appellee,

No. 41041 vs.

ROBERT WILLIAM BIXLER,

Appellant.

Appeal from Circuit Court La Salle County.

And now on this day, the Court having duly considered the petition for rehearing filed herein, and being now fully advised of and concerning the premises, doth overrule the prayer of the petition and denies a rehearing in this cause.